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REPORT

OF THE CASE OF

Shelden Hawley vs. George Ham,

TRIED BEFORE

CHIEF JUSTICE CAMPBELL,

AT THE

MIDLAND DISTRICT ASSIZES,

SEPTEMBER, 1826.

KINGSTON:

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1826.

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A Report, &c.

C. A. HAGEMAN, M. S. BIDWELL, AND G. MACAULAY, Esquires,

Counsel for the Plaintiff:

THE SOLICITOR GENERAL BOULTON, H. CASSADY, JUNR. AND J. S. CART-WRIGHT, Esquires,

Counsel for the Defendant.

JURY.

SAMUEL McCREA,
PATRICK BLACK,
JOHN HYNES,
EDWARD McFATHIDGE,
CHESTER HATCH,
THOMAS WHITLEY,

WILLIAM ASHEY,
JAMES M. RORISON,
JOSEPH WOOD,
JOHN DUNCAN,
JAMES HUSSEY,
WILLIAM LYAL.

Mr. BIDWELL opened the case.

MAY IT PLEASE YOUR LORDSHIP,

And Gentlemen of the Jury,

YOU cannot but perceive that this cause excites more than ordinary interest; not so much from its general nature, as from the peculiar circumstances attending it. Instead of attempting an ostentatious display of them, or any appeal to your passions, I shall best comply with the wishes of my client, and my own sense of professional duty and my respect for your candour and intelligence, by a simple, unvarnished statement of the case.

It is in form an action of assumpsit, brought by the Plaintiff to recover satisfaction for boarding, clothing and other necessaries provided by him for the Defendant's wife, during a period of about twelve years. The declaration contains two counts, that is two modes of stating the cause of action; but the substance is the same. To this declaration the De-

fendant has pleaded the general issue, which is a mere denial of the whole cause of action.

Although the form of action is common; yet, fortunately, such actions as the present are not of frequent occurrence among us; and, for the honor of the country, it is to be hoped that another similar to this, in all its circumstances of aggravation, will not soon come before a Court and Jury.

Before I detail the facts expected to be proved on the part of the Plaintiff, permit me to call your attention to the principles of law, which must govern the application of those facts to the case under consideration.

It is a sound general principle, that a husband is bound by law to provide for and support his wife, during the intermarriage. A married woman is legally inca-

pable of forming contracts of her own. She has no legal means of providing for herself. Her property is vested in her husband, or subjected to his use and control. Even her earnings are not her own, but his. She can bring no action to protect her person or her rights, but with his concurrence and in his name. If he were not obliged to provide for her, she would be liable to starve. His obligation, therefore, to make a provision for her, according to his means, and her necessities, is the reasonable and necessary result of the law of marriage.

This legal obligation lies upon him, not only while they live together, but also when they are-separated, if such separation is with his consent, or in consequence of his fault, and not hers. Comyn, a sensible elementary writer upon contracts, states the law in these words; "Where the husband leaves his wife; or refuses to permit her to live with him; or if he treat her so ill as to oblige her to depart from his dwelling; in either of these cases, the law makes the husband liable to her contracts for necessaries." His opinion, on each of these points, is supported by judicial authorities. Indeed it is so obviously reasonable, that every man's understanding and feelings at once approve of it. I will, however, just read a few decisions to the same effect, from books of unquestionable authority.

In *Nurse vs. Craig*, 5 Bos. and Puller, 151, Chambre Justice said, "In general, where a separation takes place by consent, the obligation to maintain the wife lies upon the husband, unless she forfeits her right to that maintenance by her own misconduct." If, therefore, you shall be satisfied by the evidence, that the Defendant, either when his wife first separated from him, or at any subsequent stage of their separation, consented to her residence in the Plaintiff's family, unless it shall be proved that she had forfeited her right to be maintained, you must allow the Plaintiff a reasonable compensation for her maintenance.

We expect to satisfy you that the Defendant is liable on more than one ground. In the days of Lord Holt, it was decided, that "If a man turns away his wife, he gives her credit wherever she goes, and must pay for necessaries for her." This has ever since been considered, and acted upon, as an established principle of law.

In *Hodges vs. Hodges*, a case reported

in 1st Espi. 441, and in most respects similar to the one now under your consideration, Lord Kenyon, whose authority is deservedly held in high respect, laid down the law in terms most strikingly applicable to the present case. As the Report is short, I will read the whole of it. (After reading it, Mr. B. observed,) In that case, the wife had been obliged to leave the house of her husband, the Defendant, in consequence of abusive treatment; but, it appeared, that she was not actually turned out of doors. She went away voluntarily, although her doing so proceeded from apprehensions of ill treatment from her husband. Upon that occasion, Lord Kenyon held, "That where a wife's situation in her husband's house was rendered unsafe, from his cruelty or ill treatment, he should rule it to be equivalent to a turning her out of doors, and that the husband should be liable for necessaries furnished for her under those circumstances."

According to this rule of law, if Mrs. Ham's situation in the Defendant's house was rendered unsafe, by either his cruelty or ill treatment, it was equivalent to his turning her out of the house, and he is liable for the necessary support furnished to her under those circumstances. In our case the father was the natural protector of the ill treated wife, as the son was in that which I have just read to you.

Again, in *Berthron vs. Cartwright*, 2 Esp. 480, an action on the case for seducing and detaining the Plaintiff's wife, he proved her elopement from his house, and her reception and entertainment by the Defendant. The defence was that she had been compelled to leave her husband's house in consequence of ill treatment. It was ruled by Lord Kenyon, that "If a husband ill treats his wife, so that she is forced to leave his house *through fear of bodily injury*, any person may safely, nay honorably, receive her and protect her; and that, of course, in such a case, no action was maintainable." In that instance, the action was brought for enticing away the Plaintiff's wife. The parties to the action were reversed; but the principle, on which it turned, was the same; and, when applied to the case before you, it is this, that if Mr. Ham treated his wife so ill that she was forced to leave his house "through fear of bodily injury," any person, and certainly then a near relative, especially a father, might safely, nay honor-

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ably, receive and protect her, and, of course, maintain an action for her necessary support. A well grounded apprehension of such injury, whether actually inflicted, or not, is sufficient. Nor need it be an apprehension of being murdered, or maimed. The fear of any thing which comes within the meaning of the term "*bodily injury*," is a lawful cause for her quitting his house, and resorting to the protection of some other person. If, for instance, she has suffered, or has good reason to fear, a *horsewhipping* from her husband, it brings her case within this rule of law; for that is a "*bodily injury*," as well as an indignity. The old barbarous doctrine, that a husband may beat his wife, by way of correction, is exploded in modern times. Such violence is illegal, and may be the subject of an indictment, or of sureties for the peace; and, therefore, according to the authority last cited, a father, a brother, or any other friend may, in a case of such corporal injury, *safely* and *honorable* interfere, and afford her protection and support.

To show that Lord *Kenyon* was not singular in his view of the law on this point, I will produce another high authority. In *Evers vs. Hutton*, 3 Esp. 255, Lord *Eldon*, then Chief Justice of the Common Pleas, now Lord Chancellor, declared "there was no doubt of the law, that where a husband, either by ill treatment compelled his wife to leave his house from motives of personal safety, or turned her out of doors, any person who afforded her protection, and furnished her with necessities correspondent to his rank and situation in life, could compel the husband to pay for them."

Even should we fail to prove that the Defendant's wife had such a lawful cause for leaving his house, in the first instance; if he afterwards refused to receive her, that was a turning of her out of doors. In *Rawlins vs. VanDyke*, 3 Esp. 251, Lord *Eldon* said, "My conception of the law is this, that if a man will not receive his wife into his house, he turns her out of doors; and if he does so, he sends with her credit for her reasonable expences." Should you, then, Gentlemen of the Jury, be convinced, from the declarations of the Defendant, or other evidence which may be adduced, that the Defendant would not receive his wife into his house, you have the opinion of Lord Chancellor *Eldon*, the highest law authority in England, that

it was tantamount to turning her out of doors, and that he thereby sent with her credit for her reasonable expenses.

His Lordship also stated, in the Report of *Evers vs. Hutton*, already referred to, "That it was settled in a case in Lord Raymond's Reports, to which he subscribed, that if the wife had eloped, and afterwards solicited to be received into the husband's house, and the husband refused to receive her, from that time he was bound for necessaries furnished to her." You will please, Gentlemen, to bear this rule of law in your minds, in order to compare it with the evidence in the case. If Mrs. Ham had eloped from her husband, or whatever was the original cause of her separation from him, yet if she afterwards solicited to be received into his house, and was not so received, from that time, at least, says the law, you must hold him responsible for the necessities furnished to her by the Plaintiff.

To these concurring authorities permit me to add one decision of the late Lord Chief Justice *Ellenborough*. In *Lidlow vs. Wilmot*, 2d Stark. 78, an action similar to the present, he told the Jury, "The first question for consideration is whether the Defendant turned his wife out of doors, or by the indecency of his conduct precluded her from living with him; for then he was bound by law to find her means of support adequate to her situation." And again, "When the wife lives separately from her husband without any fault of her own, the law provides that her husband shall be liable for her adequate maintenance."

If, then, Mrs. Ham left her husband's house, and lived separately from him, "without any fault of her own," the law, as stated by Lord *Ellenborough*, provides that her husband shall be liable for her adequate maintenance, in such an action as you are now trying. If he "precluded her from living with him," not merely by flogging her, but even "by the indecency of his conduct," he is bound by law to pay for her support adequate to her situation.

These principles of law, my Lord, are sanctioned by such a weight of venerable authorities, and are so rational and just in themselves, that it would be superfluous for me to offer arguments in support of them. I have read them to the Court, in your hearing, Gentlemen of the Jury, that you may have them distinctly in view.

and be able, as the trial proceeds, to apply them to the facts which will be proved, and which I will now state to you, according to the instructions of my client.

You have already learned that the Defendant's wife is the Plaintiff's daughter. They were married on the 25th of April, 1813. Their parents had for many years been neighbours, their families in habits of neighbourly intercourse, and they themselves brought up together, acquainted with each other from childhood. In point of age, education, circumstances, and prospects of life, the match was an equal one. It was preceded by an honorable course of attentions and courtship; and every thing seemed to justify an expectation of mutual comfort and respectability. But, I am sorry to be obliged to add, that scarcely four short months had elapsed, when the wife began to be treated with coldness, indignity and cruelty. She suffered long in silence, and endeavoured to hide her sufferings. Before she applied to her own family or friends for protection, she made an appeal to her husband's mother, for her interposition, to check the ill treatment she endured, still endeavouring to avoid any disclosure of it, to the prejudice of her husband. Suspicion, however, was excited. Rumour told the tale; and it reached the Plaintiff's ears. Upon going to the house, he found his daughter in tears, occasioned by her husband's treatment. The feelings of a father induced him to enquire into the cause, with a view to pacification, if possible. It was in vain. He ascertained that the Defendant was in the habit of flogging his wife; and he gave no hope of milder treatment, but, on the contrary, threatening still greater severity. A separation became necessary, for the wife's personal safety; and the Plaintiff could not refuse her a shelter under his paternal roof. The Defendant made no objection, at the time, to her removing, with her child. He even assisted in the removal, by seeking for her clothes and selecting some articles of furniture, which she carried with her. Here, then, was an act of assent on his part.

After he had time for reflection upon his unkind treatment of her, whom he had vowed to love and cherish, and whom it was his legal as well as moral duty to provide for and protect, he manifested no relenting or regret. On the other hand, he

exulted in the separation, as a triumph; took the child from her; and declared that he would never live with her again. This declaration he made to different persons, at various times, and repeated it some years ago to her sister, who conversed with him on the subject of being reconciled to his wife. He declared again, on that occasion, that he would not receive her, if she would come upon her knees to him. When you hear that fact from the mouth of the witness, remember, Gentlemen, that Lord Chancellor *Eldon*, in the passage of law which I read, has told you, if a man will not receive his wife, he turns her out of doors, and is answerable for her maintenance.

The repeated and uniform declarations of the Defendant, that he would never more live with his wife, being made known to her and to the Plaintiff, would have excused them, had an excuse been necessary, for omitting any further attempts for a reconciliation. But the injured, yet still affectionate wife, having seen her prospects blighted, her child torn from her bosom, and herself consigned to a state of seclusion and mortification, resolved to make one more effort. With that view, she obtained from her father a conciliatory letter to the Defendant, went to him personally, accompanied by her sister, and, in the most respectful terms, proposed and solicited that all which had passed, of an unpleasant nature, should be buried in oblivion, and they once more live together in peace and harmony. He received her proposal with coldness, evasion and insult; took a month's time to consider of it; talked about a sweet-heart kept at Montreal, and sent her back to her father with a letter, which I will produce in evidence, prescribing, in the mean time, some humiliating preliminaries, with which, from her anxiety for a reunion, she readily complied. At the end of the month, she went again to his house, to know his determination; but he required of her, as conditions of her reception, what I am ashamed to mention in a Court of Justice; that she should not eat at his table, nor sleep with him, or if she did, he would have another man sleep in another bed in the same room; that she should be confined to a chamber, and have no control or charge of the house, nor be permitted to receive or visit her family or friends; that he had a number of children about the country, whom she would

have to take care of; and she must not be surprised if he should bring home other women to cohabit with him occasionally. I forbear to mention the rest.

Gentlemen, let me put it to you, as men of sense and virtue, as husbands and fathers, which I believe most, if not all, of you are; were not those conditions indecent, as well as insulting? Was not their indecency such as, in the language of Lord *Ellenborough*, "precluded her from living with him"? Would any of you require such degrading conditions from a wife? Would you be willing to see an amiable, well educated daughter submit to such degradation? Let your own consciences answer.

She did not comply. No modest, virtuous woman could; nor could he have intended or expected her compliance. It was as effectual a rejection of her solicitation, as if he had expressed it in more direct and manly terms. She returned to her father's house; and, all hope of reconciliation or satisfaction being at an end, the Plaintiff has been constrained to appeal to you for redress.

Having stated the facts, as I am instructed to expect they will be proved, I will make two or three remarks upon them, before I proceed to the evidence.

It is incumbent on the Plaintiff to prove his case, by reasonable evidence, adapted to the nature and circumstances of it. The marriage of the Defendant, the separation of his wife from him, her residence in the Plaintiff's family, and his supplying her with boarding, clothing and other necessaries, in a comfortable and respectable style, suitable to the Defendant's circumstances in life, are facts likely to be proved by direct and explicit testimony. But his ill treatment of his wife is a matter of a different nature, and of which it would be unreasonable to expect the same kind or degree of evidence. Men do not call witnesses to attest their criminality or misconduct, but endeavour to conceal actions, of which they have reason to feel ashamed, by performing them secretly, and in the absence of spectators. Such is the unmanly act of beating a helpless female. It is a deed of darkness. No man, who values the opinion of society, however cruel or vindictive he may be, no man, in the presence of witnesses, could have the front to lift a coward arm against an unprotected woman, and that woman his own confiding

wife, who has put herself in his power, and whom he is bound in honor to protect. With every motive for secrecy and concealment, he inflicts his blows in the dark, where no human eye can see him, except the victim of his cruelty. And she, too, from a sense of mortification, a dread of becoming the subject of gossiping scandal, or perhaps a yet unextinguished regard for her husband, and a lingering hope of his returning kindness, has strong inducements to keep her wrongs to herself, and to palliate or disavow them. You will not, therefore, expect the abuse complained of in this case to be proved by eye witnesses, but by indirect and circumstantial evidence, or his inadvertent confessions. The only person who could testify directly to the facts is not a competent witness, nor can her declarations be admitted as evidence for or against either party. If her testimony were admissible, the Plaintiff's case would be easily proved.

There is another circumstance worthy of consideration. The principal transactions, which occurred before witnesses, took place in the midst of the Defendant's relatives, whose partialities and prejudices, without imputing any intentional perversion of the truth, may be supposed to have produced impressions in his favour and against the Plaintiff, and, though they are not sensible of it, may give a colouring to their recollection and representation of the facts. For such a probable bias you will make due allowance.

The first witness I shall produce is the Defendant himself; and surely he will not object against the testimony of his own letters, in which he must be supposed to have put the best face upon his conduct and his cause. It has already been stated, that the Defendant's wife, anxious to effect a reconciliation with her husband, induced the Plaintiff to write him a letter adapted to that purpose. It was intended as a peace offering. The exact purport of it we do not know, as the Plaintiff kept no copy; but I will read and put in the Defendant's answer.

"Bath 26th September 1825

Sir;

I received your letter of this date wherein you state that in order to compromise the existing difficulty between me and my wife, but had I have been in your place at the time and with the feel-

ings that then occupied your mind, I would have a more favourable opinion of your conduct, but my good Sir, you ought to recollect that passion ought to be always to be kept from overruling judgment—and in the case between us you certainly acted upon that principle, I know from this reason because all that my wife you believed, and what I said you treated with the utmost contempt, when at the same time I was telling you the truth, whether she did or not, I considered myself abused by you very grossly, as well as some others of your family, and positively know that I was shamefully used by you, and what a great error you committed in taking her, parting man and wife, how great the crime, now it appears that you have no objections to my living with her, what a change of times within your breast unasked for by me, it appears to me that when I was living with her, that you and your family wished to rule me, but I must inform you that you, nor your wife, nor my wife, nor any of your family is ever going to rule me, as I will not be interfered with by you nor no other person, I must let you know in soft words that I will never be governed by you nor no one else, you are not to come to my house to order me or my wife or my child no that is for me to see to—not for you or your family to do so, I let her return for the present until the 24th of next month I wish that length of time to take the case into serious consideration, as it is a matter of great importance to me, as I wish to spend the remainder of my days as I have for the ten years past in peace and quietness, and in that time if I can possibly make myself think that you and your family will let her remain quietly, and that I can also think that she will behave herself like a virtuous and pious woman from this time forward I will then take her, but at the same time it weighs heavy on my mind, to think that she has been gone ten years, and then come back to live with so bad a man as I represented to be by you as well as your family, your opinion must have altered very much about me, but my opinion has not altered

I am yours &c

(Signed) GEORGE HAM—
To Mr. SHELDIN HAWLEY
Ernest Town.

There, Gentlemen, you have the entire of the epistle, 'soft words' and hard. It

is the Defendant's own statement of his side of the case; and I beg your attention to a few passages contained in it.

'All my wife [said] you believed, and what I said you treated with the utmost contempt.' Here is a clear admission, that in his presence his wife had charged him, before her father, with ill treatment, and that the father, after hearing them both, believed her charge to be true. This may not, perhaps, satisfy you that it was true in fact, as she asserted, and her father believed; but it at least admits that the Plaintiff acted under a conviction of its truth; and, therefore, it acquits him of any wantonness of interference. His whole conduct, indeed, throughout this unhappy misunderstanding between the Defendant and his wife, carries self evidence of a sincere belief that he beat and abused her, so that she could not live with him in safety.

'Parting man and wife, how great the crime!' With what a grace does this moral reflection come from a man, who gloried in the separation, and has ever since proclaimed himself unwilling to live with his wife, and even in this very letter, boasts of the 'peace and quietness' he has enjoyed during the ten years of his liberation from her!

'Now it appears that you have no objections to my living with her.' The Plaintiff never did object to their living together, provided she could be safe from violence and abuse. He gave her to him at the marriage altar, in good faith, and in confidence that he would love and cherish her, as he solemnly called God and men to witness that he would; and had now no objections to his living with her, if she could only have a reasonable assurance of good treatment. That was all he had ever required, and all that was now expected or desired.

'Unasked for by me.' Observe, Gentlemen; the overture for a reconciliation, made by his wife and her father, in the most courteous and condescending manner, was 'unasked for,' undesired, unwelcome; and it was accordingly met by him with repulsive taunts. This circumstance shews where the blame of their long separation lies. Indeed the very fact, that a defendant wife, of her age and character and prospects, left her husband's house and returned to her father's, there to be a burden upon him in his moderate circumstances, submitting to all the mortifica-

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tion, embarrassment and reproach attending such a separation from her husband, and her only child, counteracting her maternal feelings, the most invincible of human passions; this fact itself affords a strong presumption, that she was driven to such sacrifices by treatment which could not be born. On that supposition alone her conduct can be accounted for. This presumptive evidence is now confirmed by the occurrences of the last year. Her offer, after such a length of time, to forgive and forget all that was past, and to live together again; and the manner in which she was, on that occasion, trifled with and repulsed, leave no doubt that the fault of their separation is his, and not hers, whatever reasons he may choose to assign for it.

'You and your family wished to rule me.' This, I believe, is the only time he ever made that excuse for his violent treatment of his wife. Such various and frivolous pretexts prove that he had no real justification.

'But, says the letter, "in soft words," I must inform you, that you, nor your wife, nor my wife, nor any of your family is ever going to rule me.' No, indeed, he would not be ruled by his wife, not he. Gentlemen of the Jury, I wish you were as well acquainted, as I am, with the mild, delicate, unassuming woman, of whose domination the Defendant, hardy and robust as he appears to be, was in such dread. I wish you could see them together, that you might judge for yourselves, by the comparison, whether the husband or the wife was in the greatest danger of being ruled with a rod of iron, or a horse-whip, if that should be the chosen instrument of family government.

'I let her return for the present, until the 24th of next month.' Here is the Defendant's express consent to his wife's residence at her father's one month, that is from the 26th of September to the 24th of October. For that month, at least, then, the Plaintiff has an undoubted right to recover for her board and maintenance. Even if he should unexpectedly fail of proving his right to be paid for the whole term, nothing can disprove his claim for this month's support; for it is founded upon the Defendant's deliberate consent, expressed under his own hand, and addressed to the Plaintiff.

Let me request you to take notice why he let her return to her father's house.

He wished, it appears, for a whole month to consider whether he should receive or reject his wife, or, perhaps, invent some form of nominal reception, which might be a real exclusion of her from his house. He probably thought that would save his purse from the legal consequences of a refusal; but, I trust, Gentlemen, your verdict will teach him the futility of such a subterfuge.

'I wish to spend the remainder of my days, as I have for the ten years past, in peace and quietness.' Here is an acknowledgment, and even an explicit avowal of the fact, that he preferred to live, as he had done for ten happy years, in a state of separation from his wife, which he declares to be a state of 'peace and quietness.' This shuts his mouth forever against any pretence of injury from the Plaintiff's entertaining his wife during that period. By his own shewing it was a benefit to him.

Yet he adds, 'if I can possibly make myself think that you and your family will let her remain quietly, and that I can also think that she will behave herself like a virtuous and pious woman from this time forward, I will then take her.' He here insinuates a doubt of her virtue. It is a base insinuation. Whether his jealousy is real, or only pretended by way of excuse for his own conduct, I am satisfied it is without any just cause. Placed as his wife has been, in an unprotected, isolated and most trying situation, exposed to temptation, and still more to suspicion and calumny, her behavior has been irreproachable and exemplary. For the truth of this assertion we appeal to the whole circle of her acquaintance, and defy him to come forward manfully, and attempt to substantiate his slanderous insinuation by proof. He dare not make the attempt.

I cannot dismiss this precious letter without pointing out one more inconsistency. 'It weighs heavy on my mind, says the moralizing Defendant, to think that she has been gone ten years.' When he wrote that sentence, he must have forgotten that he had just before expressed his wish to spend the remainder of his days as he had those very ten years of his wife's absence.

It is for you, Gentlemen, to decide whether these self contradictions do not indicate that the writer was framing artificial excuses for conduct, which he was

conscious could not be justified by a statement of facts.

When the Defendant had communicated to his wife the result of one month's consideration of her proposal, in prosecution of his concerted system of defensive operations, he wrote the Plaintiff another letter, which I will now read to you.

"Bath 2d November 1823

Mr Sheldon Hawley,

Sir This is to inform you that your daughter Hester my wife, called at my house on Monday the 24th day of October 1823 at which time I requested her to stay with me and that I would give her a decent living and maintenance if she would stay, and forbid her going away, I therefore hereby forbid, and notify you to not trust or harbor my wife Hester on my account as I will pay no debts of her contracting—

I am Sir yours &
(Signed) GEORGE HAM."

Gentlemen, I will detain you with very few remarks upon this scrap of written evidence.

It purports to be a letter of information. 'This is to inform you'; which implies that he had never before notified the Plaintiff not to trust or harbor his wife. Whether he had, or not, is immaterial. For no such cautionary notice can exempt him from a just responsibility for her support. In similar case, *Harris vs. Morris*, 4 Esp. 41, Lord Kenyon said, 'That he advertised her in the papers, and forbid persons to trust her, cannot avail him; for if he put her out of doors, though he advertised her, and cautioned all persons not to trust her; or if he gave particular notice to individuals not to give her credit, still he would be liable for necessaries furnished for her; for the law has said, where a man turns his wife out of doors, he sends with her credit for her reasonable expenses.' The Defendant's warning, therefore, is of no avail.

'I requested her to stay with me.' To call what he said to his wife a request to her to stay with him, is a perversity of language, a barefaced mockery.

'And that I would give her a decent living and maintenance.' What ideas of decency must a man have, to pretend that what he required of his wife, as the conditions of her reception, was a decent living!

'Your daughter Hester my wife.' Here, Gentlemen, is the Defendant's own certificate, that the Plaintiff's daughter is his wife; which supercedes the necessity of any further proof of the marriage.

Gentlemen of the Jury, we will only call three or four witnesses, whose testimony, in addition to these letters, will, I trust, satisfy you, that the Defendant's wife has been respectably maintained by the Plaintiff, the last twelve years, both with the consent of the Defendant, and in consequence of his ill treatment of her; either of which will entitle the Plaintiff to a remuneration. No deduction should be made on account of any personal services of the Defendant's wife; because he has not thought proper to plead or give notice of a set off, but has made his election to bring a cross action, claiming damages for harboring her, and depriving him of her service, in which action, and not in the present, any claim he may have on that score will be a proper subject of consideration. In this case it is your duty to allow the Plaintiff a fair and full remuneration for his maintenance of the Defendant's wife. The Defendant, whose circumstances are affluent, has ample means of satisfaction. The amount of damages, within the limits of the declaration, is at your discretion; and I hope you will give such a verdict, as shall prove a salutary warning to husbands not to ill treat their wives.

Isabel Hawley, being sworn, was examined by Mr Hagerman. Witness is a sister of the Defendant's wife, and daughter of the Plaintiff; was present at the marriage of her sister with the Defendant. Two or three months after Mrs. Ham's confinement, she was on a visit at her father's, and was very ill of a sore breast. The Defendant came for her, to take her home. He said, my lady, you must get ready, and go home with me, and ride behind me, at the same time shaking a whip over her head. She said she was so ill she could not ride on horse back. Her father said, go and get a waggon, and she will go with you. Defendant said again, shaking his whip over her, my lady, you must come with me; and if you live to have another child by me, I shall discharge the nurse on the third day, and make you do all the work of the house, and if you should not get out of bed, I will flog you out. This was about a year or thirteen months after the marriage.

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my wife.' Here, defendant's own certificate of his daughter is to be read the necessity of marriage.

... we will only see, whose testimony the letters, will, I think, the Defendant's wife, maintained by twelve years, both

Defendant, and treatment of her; while the Plaintiff's deduction should my personal services; because he to plead or give is made his election, claiming damages, and depriving which action, and claim he may have proper subject of case it is your due a fair and full recompence of the Defendant, whose agent, has ample the amount of damages of the declaration; and I hope you as shall prove a bands not to ill

sworn, was exact. Witness is a wife, and daughter present at the house of the Defendant. After Mrs. Ham's a visit at her father's, of a sore breast, her, to take her, you must get me, and ride before shaking whip and she was so illorse back. Her waggon, and she Defendant said again, master, my lady, you said if you live to me, I shall dismiss the third day, and back of the house, get out of bed, I was about a year for the marriage.

The Defendant finally brought a waggon, and his wife went with him, to go home.

About three years ago witness met the Defendant accidentally, and spoke to him of the separation of him and his wife, expressing a hope that they might yet be reconciled, and live happily together. The Defendant said he would never take his wife back, no, not even if she would go upon her knees to him.

On the 24th of September last, Mrs. Ham, accompanied by witness, went to Mr. Ham's house in Bath, and she offered to live with him. He seemed surprised to see her, said he was not a better man than when she left him, and added, if you come to live with me, you must look wild. If all be true, I have several children in the country, and I have a very pretty sweet-heart in Montreal, much prettier than you are. His wife said, George, that is nothing to the purpose; I want to know whether you will live with me or not? He said, I am independent here, King, Lord of all. You must humble yourself, before I tell you whether I will live with you or not. I have the whip in my own hand, and I shall use it as I think proper. I will not tell you whether I will live with you or not, until you go and make friends with my mother. She said, if your mother has any thing against me, I am willing to make her satisfaction. Two days afterwards, witness went with Mrs. Ham to the Defendant's father's, and she there said to the Defendant's mother, if I have ever done any thing to offend you, I beg your forgiveness. The old lady said she was satisfied. The Defendant came in, and his wife told him she had made friends with his mother, and his father also was satisfied, and she asked him whether they could not make up all differences and live together. He said, how do I know that they are satisfied, and wish us to live together? She then said to his father, father Ham, have you any objections to our living together? No, says old Mr. Ham, you know I always wished it. She then asked his mother, mother Ham, are you willing we should live together? The mother replied, that she had nothing to say against it. Defendant then said to his wife, if you live with me, you must do all the work of the house, and do it in style, without a frown or a cross look; for the instant I see a cross look, I shall show you the door, and you will walk. I shall dismiss all my servants, except a man to

wait on me, for I am worthy of one. She said, can't we make it up here, and I'll go home with you, and we will live together. No, says he, I have business of greater importance to attend to to-day. She said, I think this is a business of great importance. He said, he supposed she thought so, but he did not. He said he had no more to say on the subject. His wife then said, George, I shall go to your house this evening. She accordingly did go; witness did not accompany her, but when she came back, understood that Defendant would give her no answer, but told her to go home, and he would take a month to consider of the matter. The Defendant sent the Plaintiff a letter on the occasion, the same that has been read.

At the expiration of the month, on the day appointed by the Defendant, the 24th of October last, the Defendant's wife, accompanied by witness, went again to his house. He said to her, you say you have come to live with me. She said yes. He asked her if she wished to live with him? She said yes. He said, if you do, you shall be confined in a room, and I shall neither eat, drink, nor lodge with you; you shall not go out to visit, nor receive any visitors, but such as I shall direct; you shall not intermeddle with any thing about the house; for the instant you do, I will shew you the door, and you shall walk. And if I should lodge with you, will you have any objections that another man shall sleep in the same room? She said, this is not receiving me as a wife, nor treating me as such. He said, if you do not think proper to stay upon these conditions, you must go. He said further, you must not be disappointed, if five or six other women should occasionally come into the house with me. Witness said, he added other expressions, which she did not like to repeat. Mrs. Ham told him she could not stay on such conditions, and went away.

Witness believes Defendant is in good circumstances. His wife was boarded, lodged and clothed respectably by her father, at his expence, since she came home to his house, about 12 years. The child was kept at her father's until he was 12 or 13 months old.

Cross-examined by the Solicitor General. Peter Perry and his mother were present when the Defendant came to her father's after his wife. Mrs. Ham was not so ill, when she first came home to

her father's, as when she went away. She came on foot with her mother, from the Defendant's sister's. Her complaint was a sore breast. She was willing to go home, but thought she could not ride on horse back. Defendant went for a wagon, and carried her home. He flourished his riding whip over her, appeared to be in a passion—and said, make yourself ready, my lady, and come home with me. Witness did not know the cause of his passion. Mr. Perry was there, and might see what she saw, but did not know whether he took notice of it.

Mrs. Ham, while at her father's, was industrious, and when well did work as witness did, such as sewing, knitting, house work, &c. She did not take in much sewing. She was not able. Witness did not know what reason Defendant had for saying to witness, three or four years ago, that he would not live with his wife, if she would come upon her knees to him. Never heard Defendant say he was jealous of her—Does not think he had any cause for jealousy. Witness had no knowledge of her sister's being fond of a chair maker living at her father's, or of her wishing to go off with him; does not recollect any such person; never saw any person kissing her; never perceived any familiarities between Dr. Baker and her—Dr. Baker was sometimes at her father's; never saw him take any liberties with Mrs. Ham.

Defendant was a shoe maker, at the time of his marriage, and worked sometimes on a farm. The Plaintiff is a farmer; keeps no servants; the work is done by the family. Defendant, while his wife was with him, lived at his father's house, but had a farm of his own, and has since built in the village, and has been trading. Witness does not know that Defendant objected against the child's living at the Plaintiff's for fear of his learning to speak improper language, or acquire bad principles; never knew the child taught by any body to swear—he had just begun to speak a few words. The Defendant, sitting on his horse, before the house, asked to kiss the child, took him into his arms, and rode off with him, against the mother's will. She afterwards went to get the child back, but did not succeed.

The Plaintiff belongs to the Church of England, attends church regularly with his family; witness does not know whether the Defendant professes any religion;

the Plaintiff lives about three miles distant. Witness is not aware that her sister was required to join the Methodists; recollects Mrs. Ham's coming home with her father; witness saw marks which she thought were the effect of pinches on her arm; but was quite young then; is now 23 years old. Witness does not recollect that her father threatened the Defendant; recollects that when she went with Mrs. Ham to the Defendant's house last October, he said she must be confined in a chamber, not that she should have the use of one; did not hear the Defendant intimate, as his motive for proposing to have another man sleep in the same bedroom, that she had heretofore expressed a fear that he would murder her, and wished to prevent it. The Defendant's brothers Jacob Ham, Henry Ham, and Richard Ham, were present, and his brother in law William Fairfield. At the conversation at old Mr. Ham's, the 26th of September last year, the Defendant's father and mother were present, and part of the time his sister.

By Mr. Hagerman—Mrs. Ham always conducted with propriety when at her father's; recollects her refusing to go to parties.

By the Solicitor—Never knew Mrs. Ham, either with or without the witness, sit up sparkling at night with William Fairfield or Samuel Clark.

John Simpson, sworn, recollects that in 1814 or 15, in a conversation with the Defendant, as they were riding from the Coneston lake to the Carrying Place, he asked the Defendant why he separated from his wife. The Defendant said, that in consequence of some difference with her, he chastised her, and she left him. Witness understood him to say, that he chastised her with a horse whip, or riding whip, in consequence of which she went home to her father's; and that he never intended to live with her again.

Cross examined by the Solicitor General—Witness lived at the Carrying Place, and was then building his house. Defendant was keeping shop there for Ebenezer Perry. Witness and Defendant were well acquainted, and were conversing together very freely. Witness is confident that the Defendant said he chastised his wife with a whip, and that that was the reason of her going home to her father's.

Elizabeth Amey was called as a wit-

miles distant that her sister Methodists; home with which she resides on her return; is now not recollecting the Defendant went with house last confined in have the Defendant proposing to the same bed-expressed a and wish-
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ness for the Plaintiff, but did not appear. Mr. Hagerman stated that she was a material witness, had been subpoenaed, and was in attendance; and he wished it to be noted that she was publicly called, with a view to some proceeding against her for disappearing, and refusing to testify.

Collis McKenzie, Esquire, sworn, is a Magistrate, residing near the parties, is well acquainted with them; knows that Plaintiff has maintained his daughter, the Defendant's wife, decently and respectfully, since the Defendant and his wife parted. When they were married, the Defendant was a young man, doing well, had a farm of his own, and improvements on it.

The evidence on the part of the Plaintiff being closed, the *Solicitor General* rose, and observed that he did not, at the commencement of the trial, anticipate the conclusion which he now thought he had reason to expect. He supposed the Plaintiff would prove some of the facts necessary to support the action; but he had totally failed. He, therefore, moved for a nonsuit, to which, he said, he was entitled, on two grounds; 1st, that there was no evidence proper to support the action, the Plaintiff being himself the wrong doer in the first instance; 2d, that no justifiable cause of separation had been proved.

On the first point, he thought it was evident that the Defendant did not turn his wife away, but the Plaintiff wrongfully took her home to his own house; and no man should be permitted to take advantage of his own wrong.

On the second point, he contended that there was no proof of violence on the part of the Defendant towards his wife; at least, of such violence as would authorize Mrs. Ham to leave her husband, and bind him to pay for her support at another person's house. He admitted that one witness had sworn that the Defendant acknowledged to him that he had chastised her with a riding whip; but he insisted that such a chastisement was lawful, or certainly not sufficient to entitle her to leave him. Nothing short of danger or fear of the loss of life would be a justifiable cause of separation. He read several authorities in support of this position, and appealed to the Judge for the correctness of it.

Mr. Hagerman opposed the motion for a nonsuit, and contended that there was evidence to support the action on both of

the grounds of action relied on. The Defendant's repeated declarations that he would not live with his wife amounted to evidence of his implied consent that she should reside where she was, at her father's house; and his letter contained his express consent to her residing there at least one month. There was also legal evidence, from his own confession, that he had used personal violence, and that that was the cause of her leaving him and going home to her father's. On both of those grounds the action was supported. He had a right to have the case go to the Jury, and he could not submit to be nonsuited.

The Solicitor General replied, and defended the position he had before taken, that to justify a wife in departing from her husband's house, it must appear not only that there was violence on his part, but that it was violence endangering her life; otherwise her departure was not necessary. If there was occasion for it, she might apply to a magistrate to protect her by requiring the husband to find sureties for his good behaviour, which was a common occurrence, and the course pointed out by the law.

The Chief Justices said that to maintain an action of this kind, it was requisite to prove that the Defendant's conduct to his wife had been such as to render her departure necessary; which in this case did not appear. It was true it had appeared in evidence that a chastisement had taken place; but, however ungallant such conduct might be thought, a man had a right to chastise his wife moderately. To warrant her leaving her husband, the chastisement must be such as to put her life in jeopardy. Such violence or danger was not proved in this case. Were it not for the Defendant's letter, he should not hesitate to direct a nonsuit. In that letter the Defendant informed the Plaintiff that he let his wife return until the next month; which might imply his consent, that she should be boarded and supplied in the mean time by the Plaintiff at his house. It must therefore be submitted to the Jury to decide upon that question of evidence.

His Lordship wished the public to understand what the law was in such cases; that it was opposed to the practice of wives in running away from their husbands, and to the interference of parents in behalf of their married daughters, who

might happen to disagree with their husbands. He censured the parents of Mrs. Ham for interfering in the controversy between their daughter and the Defendant; and in exemplification of what the conduct of a parent should be in such a case, he facetiously related an anecdote, which he thought was applicable to the present case. A man, who had some dispute with his wife, gave her a moderate chastisement; upon which she ran home, and complained to her father. The father, affecting to resent the husband's behaviour, said, what! has the fellow had the impudence to beat my daughter? Then I will be revenged on him, and will beat his wife; which he did, and sent her back to her husband, and was no more troubled with their quarrels. Mr. Hawley should have done the same.

The Solicitor General addressed the Court and Jury in the Defence.

Mr. Lord;

And Gentlemen of the Jury;

This case is of much less importance than you were probably led to anticipate, from the public expectation attending it, and the solemn and impressive manner in which it was opened. The learned Counsel, in his address to you, exerted a degree of ingenuity and eloquence, which I have seldom heard equalled, and never exceeded. The only fault attending it is that it was not founded in fact, and is not supported by the evidence. I am sure he did not wish to deceive you; but he was himself deceived by the instructions in his brief.

If the case had been proved, as it was stated; if the serious charges opened against my client had been substantiated; if he had been shewn to be such a beast, such an absolute brute, as he was represented, I would not stand up here to defend him. The reverse, however, I am happy to find, is the truth; and I now have the satisfaction to tell you, Gentlemen, that Mr. Ham is a respectable man, who from a poor shoe maker and labourer, as he was when he married the Plaintiff's daughter, has, by his own merit and good conduct, raised himself to wealth and respectability. Were he such a monster, as they would make him to be; if he had illegitimate children scattered about the country; if he kept mistresses in Bath

and Montreal; if he really had a seraglio, like the Grand Turk; how is it that he is now associated with and respected by his neighbours? I aver that, for any thing that appears to the contrary, he is a moral, exemplary man, quite as respectable as Mr. Hawley or any of his connexions. If he were such a sordid wretch, as they would make you believe, why has he been so long on the list of magistrates? Have any of his brother magistrates remonstrated against his remaining in the commission, or objected against sitting with him? No, Gentlemen, they appear to be satisfied that he has conducted with decency and propriety. And how, Gentlemen, I would ask again, if these facts really exist, how has it happened, that in the face of such objections, and against the influence of the Plaintiff and his friends, this very Mr. Ham was, on one occasion, elected by his neighbours to represent them in Parliament?

Let his character be compared with that of the Plaintiff, whose conduct has already appeared in part, and will be further proved to have been most improper. I am not retained to asperse him; but I am instructed that we shall prove, that when he went for his daughter, he said to the Defendant, "You damned rascal, you have ill used my daughter, and she shall not live with you. I was able to support her before you married her, and I am so yet; and you will be glad to come after her in three months." That is a sample of the language of this moral man, this regular attendant upon public worship, this immaculate Clerk of the Church. I state it according to my client's instructions. There he stands. If he has instructed me wrong, the greater fool he; for you will be governed by the evidence, and not by the statement I make from my brief.

The Plaintiff had no right to interfere at all with the Defendant's family government. When a woman marries, she ceases to be under the protection of her father. Parental authority is at an end. The wife is bound to forsake father and mother and cleave to her husband. It is his right to command, and her duty to obey. This is a matter of necessity; otherwise there could be no government of the family. For both cannot be supreme. There cannot be two Kings in Brentford. One of them must have the power of governing the other. By the marriage, he

is invested with authority to restrain and control her. He may govern her, as he might a child or a servant, and, if necessary, administer moderate correction. It is not a right, which I would exercise; but it is one which the law allows, and a parent has no business to interfere. The Plaintiff, in this case, intringed the Defendant's rights, as a husband, by interfering and taking away his wife; and she did wrong in quitting him. He was then, it seems, a poor shoe-maker and day laborer, and they probably thought him inferior to themselves; but he has since, by his own industry and exertions, without her assistance, become wealthy and respectable; and now she wishes to return and share his wealth and respectability, to deck herself in the silks on his shelves, be a fine lady, and ride in her carriage. And the Plaintiff, who boasted of his ability and willingness to maintain her, turns round, and calls upon the Defendant for her maintenance. His claim is absurd. He has proved no illegal violence, to justify her separation from her husband; and there is not a shadow of evidence of his consent. The Plaintiff's Counsel, by resorting to the letter that has been read, to cover one month only with the appearance of a consent, virtually admits that there was no consent as to the residue of the term, eleven years and eleven months. Even this resort to such a pitiful expedient, to save the Plaintiff's costs, will not avail him. To construe that expression in the letter into an intention that the Plaintiff should credit the Defendant for the board of his wife, if she is his wife, during that month, would be a most forced construction of the words. He let her go back to her father's until the twenty-fourth of the next month; but he did not thereby agree to pay her father for boarding her in the mean time.

The letter has been analyzed with critical ingenuity, to distort it from its natural meaning, and render it inconsistent and ridiculous; but I think it is a well written letter, very creditable to the writer: it does him honor; it shews that, notwithstanding the disadvantages of his early education, he has made good improvement in writing. To understand it properly, it is necessary that you should hear the Plaintiff's letter, to which it is an answer. I will, therefore, read it, and put it in.

"Ernest Town, 26th Septr. 1825
Dear Sir,

I understand from your wife that in order to compromise the existing difficulty between you and her—but had you been in my place at the time, and with the feelings that then occupied my mind, I think you would have a more favourable opinion of my conduct; but if it has been any injury to your interest or character, in taking her away, I am sorry for it; and as it is her desire to return, my sincere prayer to Almighty God is that you may live in love and good will together, forgetting and burying in oblivion all former conduct. Excuse these detached sentences, and judge the feelings of my mind at the moment.

I remain, Dear Sir,
Your well-wisher,
(Signed) SHELDIN HAWLEY.
GEORGE HAM, Esq.

You see here, Gentlemen, the Plaintiff virtually admits that he had injured the Defendant, by taking away his wife, as he calls her. That is an admission that he has no cause of action; but, on the other side, the Defendant has a good cause of action against him. That will be corroborated by the testimony of the witnesses, whom I shall call.

I might, indeed, safely rest the defence upon the Plaintiff's own evidence; but the Defendant wishes to have his conduct and character fully vindicated before the public. For that purpose, I shall call a few of his witnesses.

But I ought first to observe, that if the Plaintiff had a right to recover any damages, they would be only nominal. He has had the benefit of the services of the Defendant's wife, which by law belonged to the husband; and the witness has told you that her sister, Mrs. Ham, was smart, industrious, and economical; that she washed, baked, sewed, knit, spun, scrubbed, and did the same work for her father, as the witness did. You could not hire such services short of four or five dollars a month. In such a case as this, no plea or notice of set off is necessary. The earnings of the wife are by law to go towards her support, in part, or in full, according to the amount or value of them. Her services paid, and overpaid for her board. The Plaintiff ought to repay the Defendant, instead of claiming further payment from him. It is very different

from the case of a sickly, helpless or idle lodger, doing little or nothing, but occasioning great expence.

The Plaintiff's council is personally acquainted with you, and I am not; but I am not afraid of his deriving any advantage from his personal acquaintance with you; for I can place confidence in you as sensible, honest men.

So far I have been opposing the Plaintiff upon his own ground, and considering his daughter to be the Defendant's lawful wife. But in strictness of law she is not. As he has chosen to appeal to law, he shall have enough of it. If the consequence is disagreeable, he has brought it upon himself. I contend that by the law of the land, the marriage of the Defendant with the Plaintiff's daughter is void; because the Clergyman, who married them, had no authority to do it. His claim of authority is founded upon our Provincial Statute authorising the Magistrates of the Court of Sessions to grant a certificate of licence, in a prescribed form, to ministers of the Church of Scotland, Lutherans and Calvinists; but the certificate granted to this Clergyman does not describe him as a member of the Church of Scotland, or Lutheran or Calvinist; but as a Presbyterian, which, I maintain, is not synonymous with a Calvinist. By Calvinists, the Statute must have intended a religious sect known by that name, and not merely that the principles or doctrines of the Clergyman and his church are Calvinistic. Besides, the law requires that one of the parties married shall have been, for six months, a member of the officiating Clergyman's church; and neither the Defendant nor the Plaintiff's daughter was of Mr. McDowall's church. On these grounds, I shall submit to your Lordship, that she is not the Defendant's wife, and he is therefore not under legal obligation to maintain her. The Plaintiff may keep her at home, or marry her to whomsoever he pleases.

It is important to have this point decided, not only for the purpose of the present action, but also that it may be known whether, in case of the Defendant's death, his son or his brother would inherit his estate. The Clergyman, who performed the pretended marriage, is among the witnesses, whom I shall now proceed to call; and when you hear their testimony, I trust, that notwithstanding the pathetic appeal of the Plaintiff's counsel to your

feelings and passions, you will feel yourselves bound to find a verdict for the Defendant.

Jemima Perry, sworn, was present at Mr. Hawley's when Mr. Ham came to take his wife home. He asked her to go; and she made no objection, only she was not well enough to ride on a horse. Mr. Hawley proposed to him to get a waggon, which he did, and they went home together. He had a small whip in his hand, but witness did not see him flourish it over his wife's head. He said to Mr. Hawley, that he was in his own house, and might do as he pleased: saw no improper conduct on Mr. Ham's part: was present from beginning to end: did not hear Mr. Hawley say he would not let his daughter go back: saw Mrs. Hawley shake her fist at Mr. Ham: supposes she was in a fret, because her daughter was going away: recollects to have heard her say she had rather her daughter were in her tomb, than to have married Mr. Ham.

Peter Perry, went with Mr. Ham to Mr. Hawley's, when he went for his wife. He asked her to go home with him. She said she was not well. Mr. Hawley, or some one present, proposed to Mr. Ham to get a waggon: does not know whether he did, or not: did not see Ham flourish his whip over her head. When Defendant first went in, after the usual salutations, he asked Plaintiff, if he owed him any thing, on account of his wife, and was answered in the negative; he asked Mrs. Hawley the same question, and received the same answer. Witness thought Mr. Hawley was in a passion: and Mr. Ham also, a part of the time: they had some altercation: did not hear Defendant threaten his wife: she spoke kindly to him, and he to her. Witness is married to Defendant's sister. Before he was married, recollects the Defendant asked him, if he should make a wedding, and wished witness to do it, and to invite him without inviting his wife, to mortify her family.

Mary Perry was present when Plaintiff took his daughter away: he told her she must go home with him: she did not appear to wish to go: but he told her to get ready: does not recollect hearing Plaintiff use profane or improper language on the occasion: when the Defendant's wife was directed to take down the curtains, she sat down in a chair and cried: and her mother took down the curtains. Witness thought the conduct of Plaintiff

and his wife was rather outrageous; they appeared to be irritated. Witness is sister to Defendant; lived in the same house, while he and his wife lived together; never saw him strike her; heard her once say that he did not strike her. Does not recollect ever advising Mr. Hawley to take his daughter away; or telling him that her brother had ill treated his wife, or that she had reason to fear that her life was in danger. Witness thinks if Mr. Hawley and his wife had kept away, Defendant and his wife might have lived together without difficulty.

John Ham, Jun. thinks the difference originated between his brother George Ham and Mrs. Hawley, his mother in law; thinks so from her saying that witness had treated his wife harshly, and she supposed if he did so, George would also.

Cross-examined—never tho'ht George's conduct to his wife cruel; does not recollect seeing George push his wife back violently into her bed.

Henry Ham was present at Defendant's house 24th of October, 1825, when his wife came to the house. George said, so you have come back to live with me? She said she had. He said, you think I am a better man than I was before; but you are mistaken. She answered that she would venture to live with him. He said she might have the best room in the house, and if that would not fit her, he would build another; but he would not cohabit with her; she might go in and out, as she pleased; but he would be the judge of her visitors.

John Ham is the Defendant's father; George Ham is about 33 years old: was christened by Rev. Mr. Loughorn, before Mr. McDowell was in the country; was married by Rev. Mr. McDowell. George and his wife lived in his house about nine months or a year; never knew of any difference between them. The next spring Mr. Hawley took his daughter away.

Richard Ham did not hear George say any thing amiss in the conversation with his wife, 24th October, 1825. He offered her the best room in the house, and said if it was not good enough, he would build one for her, but he would not sleep with her.

Elisha Shory saw Plaintiff the day after he took his daughter home; met them on the road; heard Plaintiff say he had taken her away, and she should not live

with Ham: he had supported her before, and could do it again.

Job Sylesworth heard the same in substance as Mr. Shorey.

Rev. Robert McDowell, being called as a witness, expressed a wish to take the oath by holding up his hand, in preference to the ceremony of kissing the book.

The Solicitor General asked him if he was a Covenanter.

The Chief Justice observed, the privilege of being sworn by holding up the hand is not confined to Covenanters. Any person, who conscientiously thinks that is the most proper mode of taking an oath, has a right to have it administered in that form. It is the common form in Scotland. Either way is equally lawful and binding.

Mr. McDowell, being sworn by holding up his right hand, produced his Licence to marry, in which he is described as a Presbyterian, but is not expressed to be a Calvinist. He also proved his certificate of the marriage of George Ham with Hester Hawley. Witness is a Presbyterian, of the Dutch Reformed Church, a Calvinist. The Presbyterian Confession of Faith is Calvinistic.

The Solicitor General. Were you ordained by a Bishop?

Witness. We are all Bishops; we make no distinction between Bishops and Presbyters. I was ordained by a Presbyter.

The Chief Justice observed that if the witness had been ordained by a Bishop, he would not have been a Presbyterian.

Witness said that the Defendant's father and mother both were communicants of his church; that the Defendant attended public worship regularly, as one of his congregation, although not a member of his church, and was married by witness to Hester Hawley, as his certificate purports.

The Chief Justice thought there was sufficient proof of a lawful marriage: but if the Defendant's Counsel wished to have the point reserved for the consideration of the Court above, he would make a note of it, which, at their request, he accordingly did.

Mr. Hagerman replied.

MAY IT PLEASE YOUR LORDSHIP,
And Gentlemen of the Jury,

The learned Counsel, who addressed you in behalf of the Defendant with his usual ability, and more than his usual zeal and confidence, introduced the defence by a fine eulogium upon his client, as a man of influence, of an unspotted and excellent character in his own neighbourhood and township. I have no disposition to disturb him in the enjoyment of whatever wealth or fame he has honestly acquired; but you should hear the language of truth. If you do not yourselves know the Defendant, there are many in whose hearing I am now speaking to you, who do know that his reputation among his neighbours and acquaintance is very different from the flattering picture drawn of it by his Counsel. I fear no contradiction in declaring, before the Court and the country, that it is notoriously bad, particularly in respect to the subject of this action. And what stronger proof could there be of baseness and total want of principle and honor, than the last and most scandalous defence, to which he has had recourse, to invalidate his own marriage, and thus prove his wife a prostitute and his child a bastard; the son whom he has brought into court here by his side, to witness this shameless defence! What, then, must he be himself, in his own view! His Counsel has accused us of wishing to make him a brute. He makes himself worse than a brute, by this desperate attempt to defend his cause by setting aside his marriage.

The Solicitor General. I took the exception to the validity of the marriage from my own opinion of the law, and not from the instructions of my client.

Mr. Hagerman. Whether it originated with him, or not, is immaterial. It is urged in his behalf, and with his assent: and it has fixed upon him a mark of infamy, which he can never survive. It is a foul stain, which no time will wear away. I tell him, in the face of the public, that he will rue it to the day of his death. The attempt is as futile as it is base and flagitious. It is founded upon a distinction without a difference; that the certificate of licence granted by the Magistrates to the Clergyman describes him as a Presbyterian, and does not specify that he is a Calvinist. Why, Gentlemen, a Presbyterian is of course a Calvinist. Calvinism is an essential part of Presbyterianism. The objection is a mere quibble. This Clergyman's authority to marry a person of his congregation, whether a church member or not, is unquestionable; and the Defendant's marriage is legal and valid; but his infamy is not the less for attempting, although unsuccessfully, to set it aside, for the sordid purpose of avoiding the payment of an honest debt.

The nature of the Plaintiff's claim was satisfactorily explained in the opening of the case; and the evidence produced in support of it, under all the disadvantages of obtaining evidence in such a case, and in spite of the phalanx of family witnesses on the Defendant's part, has, I think, established our right of action, on both of the grounds, upon which it is claimed; the Defendant's ill treatment of his wife, and his consent to her separate residence.

We have proved, beyond contradiction, that the Defendant chastised his wife with a horse whip, which was an act of violence sufficient, according to my understanding of the law, to justify her separation from him.

It is with regret that I ever differ from the bench. In the present instance, however, notwithstanding what fell from his Lordship to the contrary, I contend, and think I can shew, that by the present law of England, which is our law, a man is not at liberty to chastise his wife. That was once the law, in days of less refinement and liberality; but I am happy to say it is not so at present. The good sense and humanity of modern times have introduced a more liberal rule for the treatment of wives. In this opinion, I am born out, not only by the authorities read by my learned associate, in his clear and correct statement of the law, but more pointedly by one, which I will now read, from the first volume of Blackstone's *Commentaries*, page 444. After mentioning that by the old law a husband might give his wife moderate correction, this standard commentator on the laws of England says, "But, with us, in the polite reign of Charles the second, this power of correction began to be doubted; and a wife may now have security of the peace against her husband, or, in return, a husband against his wife. Yet the lower rank of people, who are always fond of the old common law, still claim and exert their ancient privilege; and the Courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour." He is merely permitted to restrain her of her liberty, and that only in a case of gross misbehaviour.

This is the modern law of England. Against a husband's moderate correction of his wife, such as in early times was allowed, the wife may now have security of the peace. It is, then, a breach of the peace, an unlawful act, an indictable offence, in the same sense, and in the same manner, as an assault and battery of a wife against her husband. Such a beating of a wife by her husband is an act of violence, and comes within the letter and spirit of the decisions of Lord Kenyon, Lord Ellenborough, and Lord Chancellor Eldon, that it is equivalent to turning her out of doors, in consequence of which the husband becomes chargeable with her necessary support.

the Plaintiff's claim was founded in the opening of the evidence produced in support of the disadvantages of obtaining such a case, and in spite of many witnesses on the Defendant's side, I think, established our claim on both of the grounds, upon which I am minded; the Defendant's ill treatment of his wife, and his consent to her separation.

Indeed, beyond contradiction, the Defendant chastised his wife with a riding whip; in plain English, he horse-whipped her; and, as he himself declared, that was the cause of her leaving him. Does the modern rule of law authorise a man thus to horse-whip his wife? To govern or punish her with the same instrument of brutal force, as he would a horse? To treat her, in short, as a beast of burden? Horse-whipping is not only an act of violence, but of indignity, and degradation, incompatible with the harmony and affection which should exist between husband and wife. A horse-whipped wife could not be a companion, a bosom friend, but a mere slave. All mutual comfort, the very end of a married state, would be defeated by such a slavish, degrading system of discipline. The Defendant's wife, then, had good cause to leave him, for her personal safety; and her father was the proper friend to receive and protect her, until she could have some reasonable assurance of better treatment from her husband. Could he in duty and honor do less? Has he done any more? What object beyond that could he have? Men act from motives. Now, let me ask you, what inducement the Plaintiff could have to take back his daughter, whom he had given in marriage, and to burden himself with the charge of her, except for her personal safety? Is there, can there be, a doubt in your minds, that he acted under that impression, and with that view? The transaction itself, and his subsequent conduct, concur to prove it. As soon as there was any rational hope of a reconciliation, he united with his daughter in taking the most conciliatory and even condescending steps towards so desirable an accommodation.

What, on the other side, has been the uniform conduct and declaration of the Defendant? He has shewn no cause for his aversion to his wife, but his own ill humour, and his ill treatment of her. In most family differences, each party, even the most innocent, is chargeable with some fault. But what fault, through the whole of this unhappy difference, has the evidence attached to the injured wife? None. Yet in 1814, or 15, soon after the separation, he avowed to the witness Simpson his determination not to live with her. Three or four years ago, he declared to Miss Hawley, that he would not receive his wife, even if she should come upon her knees to him. For this he assigned no reason; and none can be found, except his notorious ill treatment of her, and his libertine love of variety. He was not willing, it appears, to be confined to the embrace of a virtuous wife. He chose to range at large, to indulge his licentious appetite with other women, and scatter his illegitimate children about the country. For proof

of this, we need not resort to the public notoriety of facts. It is proved by his own unblushing admission. He has even gloried in his shame, and boasted of it to his unoffending wife, and that too at the very time when she was seeking for a reunion, in the most conciliatory and condescending manner. His conduct and language at the interviews with her in September and October, 1825, were congenial with his character and his principles. By insisting on degrading and inadmissible conditions of her reception, he refused to receive her. He taunted, insulted and drove her away. I will not go through the particulars of that disgusting scene. Gentlemen, what think you of his telling her he had a very pretty sweet-heart in Montreal; that he had a number of brats about the country for her to take care of, if she should live with him; and that he would reserve a right to be visited in his own house by his mistresses? What inference are you to draw from his proposal to his wife to have another man sleep in the same bed room with them? Is there any one who now hears me, whose blood does not boil within him at such a proposition? Whose soul does not revolt at the cold-blooded brutality of the man? He must have had one or the other of two objects in view. If she rejected the offer, as she did with silent indignation, he would say it was her own fault that she did not stay and live with him. If she submitted, what then was to follow? Gentlemen, you have perhaps heard of an atrocious occurrence near the Napapane mills. One John Clark (I suppose you all know him) induced an ignorant, unfortunate female to consent to be married to a man then living at his house. The wretched John proceeded to join the parties in holy wedlock; and the day, with its festivities, being over, the happy couple retired to bed. As was concerted before between the bridegroom and Clark, the former, as soon as his dupe fell asleep, got up, and left the room a few minutes, and Clark took possession of the bed: The bridegroom immediately returned, and affected to discover that his newly married wife was false to him; upon which the marriage was declared void. Gentlemen, do you think that Mr. Ham, with the knowledge of a stratagem just suited to his ideas of right and wrong, would not avail himself of so good an opportunity as his wife's submission to his proposal would give him, to rid himself of her for ever?

Gentlemen of the Jury, my learned friend has told you, that I am better acquainted with you, than he is. I believe I am; and I am proud of it. Had he known you as well as I do, and had he known the general opinion and feeling of the country around his client, he would not have referred you to Mr. Ham's reputation among them. A Jury from that vicinity, where the parties are known, and the cause in all its bearings is

well understood, would find a verdict against him without leaving the box, and would allow the Plaintiff the full amount of his claim.

We have not only proved the Defendant's ill treatment of his wife, amounting to a turning of her out of doors, and sending credit with her for her competent support; but we have also proved his assent to her separate residence. At the time her father took her away, did the Defendant object to her removal? Have any of his own witnesses, any of the Hams, old or young, proved the least objection on his part? Nothing of the kind. They have represented that his wife was reluctant, but he manifested no reluctance at parting. By being present, and not objecting, he tacitly assented to it. And he has ever since uniformly evinced his satisfaction. In the letter, which his Counsel thinks so very creditable to him, as a specimen of his literary improvement, he speaks of the period of his separation, as a desirable state of peace and quietness. There is a strong implied consent to the whole term of her separate residence. And there is proof, under his own hand, of his most direct and explicit assent to part of it. The Plaintiff, therefore, has a right to your verdict, certainly for one month's maintenance of the Defendant's wife; and I trust you will be satisfied that he is entitled to a fair allowance for the whole term of her residence with him, which is proved to have been twelve years. All that time he has furnished her with such support as his own circumstances permitted, and the rank and circumstances of the Defendant required.

Any benefit derived from the services of the Defendant's wife is not to be taken into account in this action, because the Defendant has brought his action against the present Plaintiff, for depriving him of the service of his wife. The damages are entirely within your control. In determining the a-

mount, I have full confidence that you will do justice to the Plaintiff, and I ask no more.

The Chief Justice stated the case to the Jury, explained to them the grounds on which alone the action could be supported, and gave them a view of the law, as expressed in his decision overruling the motion for a *Nonsuit*. He repeated his opinion that a husband may lawfully chastise his wife; but it must be a moderate and reasonable correction, not cruel and outrageous. He read his notes of the testimony of the witnesses on both sides, and commented on the evidence. He thought there was no proof of any excessive or violent chastisement of the Defendant's wife, of any beating that endangered her life, or made it necessary for her to leave her husband's house, and seek protection at her father's. He did not see any sufficient evidence of the Defendant's consent to the separate residence of his wife, unless it was contained in his letter dated 26th September, 1825, in which he informed the Plaintiff that he let her return until the 24th of the next month. He left it to the Jury to decide whether, taking the whole letter together, that amounted to a consent, on his part, to the separation during that month. If they thought it did, he directed them to find in favour of the Plaintiff for that month's maintenance of the wife, and no more, otherwise, to find a verdict for the Defendant.

The Jury brought in a verdict in favour of the Plaintiff for two pounds ten shillings damages; and the Judge, on motion, granted a Certificate for full costs.

At the ensuing Michaelmas Term, the Defendant's Counsel moved the Court to set aside the verdict, and enter a *Nonsuit*, upon the point reserved at the trial; but the Court overruled the motion, and gave judgment for the Plaintiff.